BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DARIN K. HERNANDEZ	)	
Claimant	)	
VS.	)	
	)	Docket No. 196,090
STATE OF KANSAS	)	
Respondent	)	
AND	)	
	)	
STATE SELF INSURANCE FUND	)	
Insurance Carrier	)	

ORDER

Respondent appeals from the Award of Administrative Law Judge Jon L. Frobish dated August 11, 1998. The Administrative Law Judge granted claimant an award based upon a 16 percent impairment to the left upper extremity at the shoulder, and additional temporary total disability benefits from May 8, 1995, through October 24, 1996. Oral argument was held on March 3, 1999.

APPEARANCES

Claimant appeared by his attorney, Carlton W. Kennard of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, William L. Phalen of Pittsburg, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations set forth in the Award of the Administrative Law Judge are adopted by the Appeals Board for the purpose of this order.

ISSUES

(1) What is the nature and extent of claimant's injury?

(2) Is claimant entitled to additional temporary total disability compensation for the period May 8, 1995, through October 24, 1996?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Claimant suffered injury to his left shoulder while working for respondent on July 5, 1994, when he was trying to control a patient at the Parsons State Hospital. Claimant was referred to his primary physician, Dr. Arun Sharma, who took x-rays and prescribed anti-inflammatories. When the problem did not resolve, claimant was referred by Dr. Sharma to Dr. Kevin Mosier, an orthopedic surgeon, on August 1, 1994. Dr. Mosier initially treated claimant conservatively, diagnosing a rotator cuff strain in the left shoulder. He later changed his diagnosis to a rotator cuff tear. This tear was confirmed by MRI on October 5, 1994.

On December 6, 1994, Dr. Mosier performed surgery on the torn rotator cuff. During the operation, he found an avulsion fracture of the greater tuberosity of the left shoulder. He excised small bone fragments from the shoulder and reattached the rotator cuff tendons to the bone. Dr. Mosier then referred claimant for physical therapy. He continued treating claimant through May 1, 1995, at which time he felt claimant had reached maximum medical improvement, and rated claimant at 5 percent impairment to the left upper extremity using the AMA Guides to the Evaluation of Permanent Impairment. The record does not specify which edition of the AMA Guides was utilized.

At the time of the examination in May 1995, Dr. Mosier found claimant to have excellent strength in his shoulder and a full range of motion, although not without pain. There were no abnormal findings in his May 1, 1995, examination. He gave claimant a certificate, indicating he could return to light duty, although claimant did request that he be taken off work entirely because he was apprehensive about working and reinjuring his shoulder.

When questioned about spontaneous reinjuries of the rotator cuff, Dr. Mosier indicated that they do not occur very often but occasionally can. He opined that generally it would take some intervening cause to create a re-tear.

Respondent provided evidence that claimant was playing softball in the summer of 1995. Dr. Mosier cautioned that playing softball could potentially generate a reinjury of the rotator cuff. However, Tom Trolloppe, a friend of claimant, testified that, while playing with claimant in the summer of 1995, he noted claimant only threw underhanded. Since claimant's injury to his shoulder in 1994, he had never seen claimant throw the ball overhand. Dr. Mosier stated that throwing the softball underhanded would probably not put significant strain on claimant's rotator cuff.

Dr. Mosier next examined claimant in November 1995. At that time, claimant had some ongoing pain complaints, but Dr. Mosier found nothing in the examination that would change claimant's work status. He did note that claimant's subjective complaints of pain with use of the shoulder would cause him to place some restriction on the more strenuous aspects of claimant's job. However, the record indicates claimant did not return to work after the May 1995 release, fearing reinjury. Claimant's refusal to return to work resulted in his termination of employment. On the discharge statement to the Kansas Department of Human Resources, claimant indicated that he did not return to work because his coworkers were angry with him for being off the previous year, and he felt that returning to this situation would not be in his best interest. Claimant, on the other hand, alleges that his failure to return to work was out of fear of reinjury, rather than concerns about his coworkers.

After claimant was examined by Dr. Mosier in November 1995, he was referred to Dr. Craig Satterlee, an orthopedic surgeon, on December 21, 1995, for a confirming opinion. During Dr. Satterlee's examination, claimant voiced a history of pain, when his shoulder was in certain positions. However, on the day of the examination, he was unable to recreate this pain. Dr. Satterlee was unable to find any positive findings relating to the claimant's rotator cuff. Claimant had a negative impingement sign and a mostly painless evaluation of the shoulder.

Dr. Satterlee next saw claimant on May 6, 1996, at which time claimant's shoulder continued to bother him. Dr. Satterlee obtained a repeat MRI of the shoulder, which showed a re-tear of the rotator cuff. Dr. Satterlee next examined claimant on October 24, 1996, by which time his treatment was authorized. He recommended additional surgery which was performed on November 12, 1996. During the surgery, he discovered that two-thirds of the previous repair had been torn loose. This was repaired.

Dr. Satterlee confirmed that, between December 1995 and October 1996, claimant's physical condition had changed. In December 1995, he didn't have positive findings, especially in regard to the rotator cuff. The impingement sign was negative, and the evaluation of the shoulder was normal and, for the most part, painless. However, by October 1996, claimant's impingement sign was positive, and he displayed significant

physical signs of pain from the rotator cuff, including an arc of pain. He described this as being a fairly specific sign of injury emanating from the supraspinatus, which is the top of the rotator cuff muscle. He testified that these findings indicated two significant changes between the examination in 1995 and the October 1996 examination.

When asked what could cause a re-tear, Dr. Satterlee indicated several things could be the cause. The mere fact that claimant had a massive tear to begin with predisposes a person to a tear because that area would be weaker than a healthy rotator cuff. Even a mature rotator cuff repair would only recover to about 86 percent of its previous strength. It would never reach 100 percent of the original strength. He noted that many of his patients would report a very specific event, which would lead up to re-tears of the rotator cuff, but at other times the tear would occur without any known act. He last saw claimant on March 13, 1997, at which time he released him with a 16 percent impairment to the upper extremity at the shoulder. This was based upon the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised).

Dr. Mosier confirmed that, as of May 6, 1996, when he read the MRI, he would have taken claimant off work if no light duty were available. He also opined that but for the previous initial tear claimant would not have suffered the re-tear, although he couldn't rule out any intervening accident. Claimant did not advise him of any traumatic episode leading up to this re-tear. He could not say with any reasonable degree of medical certainty when or how claimant re-tore his rotator cuff.

Dr. Mosier opined that, if the initial repair was weak or if the healing process was incomplete, it wouldn't take much exertion to cause the repaired part to come apart. He noted that spontaneous re-tears of the rotator cuff do not occur very often, but can happen. He had no medical basis upon which to relate the tear to claimant's work activities at Parsons State Hospital. When asked about claimant's playing softball, he confirmed that throwing a softball could cause a rotator cuff injury. However, throwing the ball underhanded would not put significant strain on the claimant's rotator cuff.

CONCLUSIONS OF LAW

> [W]hen a primary injury under the Workmen's Compensation Act is shown to have arisen out of and in the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

Jackson v. Stevens Well Service, 208 Kan. 637, 493 P.2d 264 (1972); *see also* Adamson v. Davis Moore Datsun Inc., 19 Kan. App. 2d 301, 868 P.2d 546 (1994).

However, the Kansas Supreme Court, in Stockman v. Goodyear Tire & Rubber Co., 211 Kan. 260, 505 P. 2d 697 (1973), stated:

> The rule in Jackson is limited to the results of one accidental injury. The rule is not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in Jackson would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In Stockman, the claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The Stockman court found this to be a new and separate accident.

In Gillig v. Cities Service Gas Co., 222 Kan. 369, 564 P.2d 548 (1977), claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. However, in March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while changing position to watch television, the claimant's knee locked on him. He later underwent surgery. The District Court, in Gillig, found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

The Kansas Court of Appeals, in Graber v. Crossroads Cooperative Ass'n, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982), was asked to reconcile Gillig and Stockman. It did so by noting that Gillig involved a torn knee cartilage which had never healed. Stockman, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The Graber court found that its claimant had suffered a new injury which "slip was a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."

The above cases distinguish between a continuing disability resulting from complications of an initial injury and a new, distinct traumatic event that is beyond a mere aggravation. The continuing disability which is aggravated is compensable as a natural consequence of the original injury, while the increased disability from a new and separate non-work-related accident is not. If the second injury or disability was produced by a significant or traumatic event, involving substantial force or unusual exertion, the second injury will constitute an intervening cause and, therefore, a new and separate accident.

Here, claimant's condition does not appear to stem from a new and separate accident. While respondent contends that claimant's softball activities led to the re-tear

of the rotator cuff, the description of claimant's activity, by both claimant and Mr. Trolloppe, indicates claimant did not participate in physical activities on the softball field which would be damaging to his rotator cuff. Dr. Mosier agreed throwing underhand would not place strain on the rotator cuff like throwing overhand. There is no evidence in the record to indicate claimant threw any other way other than underhand and, therefore, the Appeals Board cannot find that claimant's softball activities constitute an intervening cause or separate injury to claimant's left shoulder. Therefore, the finding by the Administrative Law Judge that claimant's injury is a natural and probable consequence of the original injury and resulting operation, and therefore compensable, is affirmed.

The Appeals Board further affirms the Administrative Law Judge's award of a 16 percent impairment to the left upper extremity at the shoulder, based upon the opinion of Dr. Satterlee, the only physician who rated claimant after the second operation.

Finally, with regard to claimant's entitlement to temporary total disability compensation, the Appeals Board finds that claimant should be awarded additional temporary total disability compensation beginning May 6, 1996, and continuing through October 24, 1996. While claimant alleges he was temporarily disabled before this date, the examination by Dr. Satterlee in December 1995 does not indicate that claimant was temporarily disabled at that time. Even though claimant had subjective complaints of pain, Dr. Satterlee found a negative impingement sign and, for the most part, a painless evaluation of claimant's shoulder. He testified, however, that claimant's condition from December 1995 through October 1996 had changed materially. He also stated that he would have found claimant unable to work, or at the very least be significantly restricted from work, at the time of the May 6, 1996, evaluation.

While Dr. Mosier backdates claimant's temporary disability to his May 1995 examination, it is noted that he released claimant on May 8, 1995, to light duty. He found nothing in the November 1, 1995, examination of claimant that would change his mind in that regard. The Appeals Board finds that the opinion of Dr. Satterlee finding claimant to be temporarily disabled as of May 6, 1996, is the more credible opinion in the record. Therefore, claimant is awarded additional temporary disability compensation beginning May 6, 1996.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Jon L. Frobish dated August 11, 1998, should be, and is hereby, modified with regard to claimant's entitlement to temporary total disability compensation, and affirmed in all other respects.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Darin K. Hernandez, and against the respondent, State of Kansas, and its insurance carrier, State Self Insurance Fund, for an accidental injury occurring on July 5, 1994, and based upon an average weekly wage of $378.46.

Claimant is entitled to 85.59 weeks of temporary total disability compensation at the rate of $252.32 per week in the amount of $21,596.07, followed by 22.31 weeks of permanent partial compensation at the rate of $252.32 per week in the amount of $5,629.26, for a total award of $27,225.33 for a 16 percent permanent partial impairment to the left shoulder. As of the time of this award, the entire amount is due and owing in one lump sum minus any amounts previously paid.

Claimant is further entitled to unauthorized medical up to the statutory maximum, upon presentation of an itemized statement verifying same.

Future medical will be awarded upon proper application to and approval by the Director of Workers Compensation.

Claimant's contract for attorneys fees is approved insofar as it does not contravene K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Karen Starkey, CSR	
Transcript of regular hearing	Unknown
Martin D. Delmont, CSR	
Deposition of Tom Trolloppe	$140.00
Hostetler & Associates, Inc.	
Deposition of Charles Craig Satterlee, M.D.	$227.70
Heather A. Lohmeyer, CSR	
Deposition of Michael Forbes	$165.95
Shaun J. Higgins, RPR-CM	
Deposition of Dr. Kevin Mosier	Unknown

IT IS SO ORDERED.

Dated this ____ day of April 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Carlton W. Kennard, Pittsburg, KS
William L. Phalen, Pittsburg, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director